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Supreme Court of the United States

October Term, 1947. No. 768

HARRY SCHNELL, SAMUEL SCHNELL, LOUIS SCHNELL and SAUL SCHNELL, Co-partners doing business under the firm name and style of H. SCHNELL & CO.,
Petitioners
(*Libellants below*),

against

THE UNITED STATES OF AMERICA, as owner of the Steamship "TUBUL,"
Respondent
(*Respondent below*).

Petition of H. Schnell & Co. and Brief in Support of Petition for a Writ of Certiorari.

JOSEPH JOFFE,
Counsel for Petitioners,
141 Broadway,
New York City.

THE REPORTER COMPANY, INC., New York City—1948

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Supreme Court of the United States

HARRY SCHNELL, SAMUEL SCHNELL, LOUIS SCHELL and SAUL SCHNELL, Co-partners doing business under the firm name and style of H. Schnell & Co., Petitioners (Libellants below), against THE UNITED STATES OF AMERICA, as owner of the Steamship "TUBUL," Respondent (Respondent below).	October Term 1947 No.

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of H. Schnell & Co., a partnership, respectfully shows to this Court as follows:

1. This is a petition to review a final decision and judgment, in admiralty, of the United States Circuit Court of Appeals for the Second Circuit, which affirmed (by a divided Court) a final decree for the respondent made by the District Court for the Eastern District of New York, dismissing petitioners' libel. The opinion of the District Court (Inch, J.) is reported in 73 Fed. Supp. 757 and is found at pages 91-93 of the Record. The opinion of the Circuit Court of Appeals is not yet reported, but will be found at pages 102-108 of the Record. The dissenting opinion of Judge Frank will be found at pages 108-112 of the Record.

II. This Court has jurisdiction to review the judgment under Title 28, Section 347 of the United States Code (Section 240 of Judicial Code) and Title 28, Section 350 of the United States Code.

III. The petitioners are importers, who sought to recover for damages to a cargo of garlic shipped from Valparaiso, Chile, to New York aboard the S. S. "Tubul," owned by the United States of America. The petitioners were the holders for value of the bills of lading in question (page 21 of the Record and Libellants' Exhibit 1, pp. 65-67).

The suit was brought under the Suits in Admiralty Act of March 9, 1920, Title 46, par. 742, U. S. C. A.* The libel was filed on August 13, 1945 (page 3 of the Record). The S. S. "Tubul" was owned by the United States (Finding of Fact 3, page 94 of the Record). When the libel was filed, the vessel was at Valparaiso (Finding of Fact 9, page 95 of the Record). During the pendency of the action the S. S. "Tubul" was within the jurisdiction of the Court on numerous occasions and remained in the Eastern District of New York from Feb. 23, 1947, to the date of trial (Finding of Fact 10, page 95 of the Record).

Respondent in its original answer admitted the operation of the S. S. "Tubul" by the United States and further admitted the jurisdiction of the District Court. So the pleadings stood for two years until the case was reached for trial. On the day of trial respondent moved to amend its answer to deny jurisdiction and to set up a separate defense that the vessel was being operated under a demise charter and was not in the control of the United States (pages 17-18 of the Record). No claim is made that the petitioners had notice or were ever put on notice that the vessel was operated under a demise charter (pages 103-104 of the Record).

After adducing the proof to sustain their claim, the petitioners moved to amend their libel to conform to the proof, which motion was allowed (page 34 of the Record).

* The full text of the statute will be found in the back of the brief.

Upon conclusion of the trial, the District Court dismissed the libel on the ground (1) that the United States was not liable *in personam* because the vessel was operated under a demise charter, and (2) that the suit could not be maintained as an action *in rem* because the vessel was in Valparaiso when the libel was filed (pages 91-93 and 103 of the Record).

IV. The Circuit Court of Appeals affirmed (Frank, J., dissenting as to the second ground) holding (1) that the United States was not liable *in personam* because the charter was a demise; that under such circumstances the master is not the shipowner's agent; and that bills of lading signed by him bind the charterer but not the shipowner. And this is true, the Court said, although the bill of lading contained no reference to the charter party and the shipper had no notice of its existence (page 104 of the Record); (2) that the District Court was without jurisdiction as to any cause of action *in rem* because the S. S. "Tubul" was outside the territorial waters of the United States when the libel was filed, and this lack of jurisdiction was not cured by her being in the United States and within the territorial waters of the District Court during the pendency of the action and continuously for some time before and during the trial (pages 106-107 of the Record).

The petitioners, in reliance upon the bill of lading, sued the registered owner of the vessel, to wit, the United States. The Government appeared in the action and served an answer which admitted the jurisdiction of the District Court and which did not plead or otherwise indicate the existence of a demise charter. For the first time two years later, after the statute of limitations had run against the claim, the Government disclosed this fact by moving to amend its answer at the trial. As a consequence of this belated disclosure, the petitioner was nonsuited.

This decision places upon a shipper the onerous, and in many instances the impossible burden of ascertaining the operator of a ship pursuant to a private agreement, and the party responsible to the shipper or to a subsequent holder of a bill of lading.

The decision creates an impractical and undesirable situation for a foreign shipper. There is no way for him to know or to determine that the ship is not being operated by its registered owner. Nor is there anything to put him on notice thereof either as a matter of fact or law.

That the situation is undesirable is self-evident when we consider that he has no action *in rem* in the foreign port because of sovereign immunity. His sole recourse would be to come to the United States to bring an action under the Suits in Admiralty Act. The impediment placed in the shipper's way by this decision is not in furtherance of maritime trade.

V. Your petitioners respectfully submit that this decision and result are:

(a) *in conflict with the applicable decision of this Court.* A contract made by the master in the usual course of the employment of the vessel, and entered into with a party who has no notice of any restriction upon that apparent authority binds the owners of the vessel.

> *Schooner Freeman v. Buckingham, et al.*, 18 How. 182, 190.

The maritime law as to the position and power of the master and the responsibility imposed upon the owners is not derived from the civil law of master and servant nor from common law. It had its source in the commercial usage and jurisprudence of the Middle Ages.

> *The China*, 7 Wall. 53, 68.

The basis for the imposition of liability upon the ship or the owner for the acts of the master is the doctrine of estoppel.

Higgins, et al., v. Anglo-American S. S. Co., 248 Fed. 386.

The maxim of the civil law—*sic utere tuo ut non laedas alienum*—is applicable to the situation disclosed herein.

(b) *The decision is in conflict with the decision of this Court.*

This Court in

Nahmeh v. United States, 267 U. S. 122, 125-126,

held "that the rule as to strict construction of statutes providing for suit against the United States" was inapplicable to the Suits in Admiralty Act, the "liberal provisions" of which "should not be interpreted in a restricted • • • sense."

The Circuit Court of Appeals interpreted this Statute (Admiralty Act of March 9, 1920, Title 46, Par. 742, U. S. C. A.) contrary to the intent expressed therein by Congress.

It being the plain purpose of Congress, by the Suits in Admiralty Act, to provide a convenient forum and unequivocal consent for shippers to sue the United States, it is the duty of the Court to further this purpose within the limits of reasonable interpretation of legislative expression.

Hust v. Moore-McCormick Lines, 328 U. S. 707.
McGhee v. United States, 154 Fed. (2nd) 101, 104-105.
McInnes v. United States, 152 Fed. (2nd) 387, 388.
Benedict on Admiralty (6th ed.), Vol. 1, p. 453.

(c) *The decision and result determine an important question of federal law pertaining to admiralty which should be settled by this Court.*

The decisions of the lower courts on the question decided are in irreconcilable conflict as will appear from an examination of the following cases:

Carroll v. United States, 133 Fed. (2nd) 690 (C. C. A. 2nd).

McGhee v. United States, 154 Fed. (2nd) 101 (C. C. A. 2nd).

Abbott v. United States, 61 Fed. Supp. 989 (S. D. N. Y.).

Grant v. U. S. War Shipping Administration, 65 Fed. Supp. 507 (E. D. Pa.).

Sawyer v. United States, 66 Fed. Supp. 271 (S. D. N. Y.).

Metaxas v. United States, 68 Fed. Supp. 667 (S. D. Cal.).

2. The Circuit Court of Appeals decided this case on a technical interpretation of the pleadings, when this Court, admonishing the lower courts in a similar situation, said in the case of

Krauss Bros. Co. v. Dimon Steamship Corp., 290 U. S 117, 124.

"Admiralty is not concerned with the form of the action, but with its substance."

The Second Circuit controls the most active water transportation center of the United States, its decisions on shipping are considered of the greatest importance, and the decision in this case, unless corrected, is bound to produce a tremendous amount of harm.

WHEREFORE, your petitioners pray:

(a) That a writ of certiorari may issue out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding the said Court to certify and send to this Court on a

day to be designated in said writ, a full and certified transcript of the record and of proceedings in the Circuit Court of Appeals for the Second Circuit in the suit entitled "HARRY SCHNELL, SAMUEL SCHNELL, LOUIS SCHNELL and SAUL SCHNELL, co-partners doing business under the firm name and style of H. Schnell & Co., against THE UNITED STATES OF AMERICA, as owner of the Steamship "TUBUL," to the end that the said suit may be reviewed and determined by this Court as provided in United States Code, Title 28, Judicial Code and Judiciary, Section 350; and that the decision and judgment of the Circuit Court of Appeals for the Second Circuit in the said suit may be reversed by this Honorable Court.

(b) That your petitioners may have such other and further relief as to this Court may seem proper and just, and in conformity with the laws of the United States.

(c) And your petitioners will ever pray, etc.

H. SCHNELL & COMPANY,
by HARRY SCHNELL.

JOSEPH JOFFE,
Of Counsel for Petitioners.

State of New York,
County of New York, ss:

HARRY SCHNELL, being duly sworn, says that he is the surviving member of the firm of HARRY SCHNELL, SAMUEL SCHNELL, LOUIS SCHNELL and SAUL SCHNELL, Co-partners doing business under the firm name and style of H. Schnell & Co., the petitioners above named, and that he has read the foregoing petition and knows the contents thereof, and the matters therein set forth are true to the best of his information, knowledge and belief.

HARRY SCHNELL.

Sworn to before me this
26 day of April, 1948.
ORRIE L. SHURE
Notary Public in the State of New York
Residing in Kings County
Kings Co. Clk's No. 31 Reg. No. 182-S-0
N. Y. Co. Clk's No. 92, Reg. No. 112-S-0
Commission Expires March 30, 1950
(Notarial Seal)

I hereby certify that I have examined the foregoing petition, that in my opinion it is well founded and entitled to the favorable consideration of the Court, and that it is not filed for the purpose of delay.

JOSEPH JOFFE,
Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Supreme Court of the United States

HARRY SCHNELL, SAMUEL SCHNELL, LOUIS SCHNELL and SAUL SCHNELL, Co-parnters doing business under the firm name and style of H. Schnell & Co., Petitioners (Libellants below), against THE UNITED STATES OF AMERICA, as owner of the Steamship "TUBUL," Respondent (Respondent below).	October Term 1947 No.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

ARGUMENT.

I.

The Circuit Court decision interpretative of the Suits in Admiralty Act is in conflict with the Congressional intent and decisions of this Court.

The remedy afforded by the Suits in Admiralty Act is as extensive as that enjoyed by a libellant in a proceeding in admiralty against a private owner of a steamer..

The Act specifically provides:

> "That such suits shall proceed and shall be heard and determined according to the principles of law and the rules of practice obtaining in like cases between private parties." (46 U. S. C. A., par. 743.)

It is our contention that if the S. S. "Tubul" had been a privately owned vessel, petitioners would have been able to libel it at any time while it was in the Port of New York during the pendency of the action.

> *F. E. Grauwiller Transportation Co. v. Exner Sand & Gravel Corp.*, 162 Fed. (2nd) 90 (C. C. A. 2nd).

In the above case the Circuit Court held that a privately owned vessel can be libeled even while the case is pending on appeal.

A study of the Congressional Record establishes that Congress intended that an action *in rem* against the Government was maintainable even where the vessel was not within the territorial jurisdiction of the District Court when the action was begun.

The original bills (H. R. 7124, July 1, 1919, and S. 2253, June 23, 1919) provided, in Section 1, that the United States could be sued *in personam:*

> "* * *for any cause of action of which said courts ordinarily have cognizance in their admiralty and maritime jurisdictions, arising since April 6, 1917, out of or in connection with the possession, operation or ownership by the United States * * * of any merchant vessel, or the possession, carriage or ownership by the United States, or such corporation, of any cargo in those cases where, if the United States were suable as a private party, a suit *in personam* could be maintained, or where, if the vessel or cargo were privately owned and possessed, a libel *in rem* could be maintained *and the vessel or cargo could be arrested or attached at the time of the commencement of suit.*" (Italics ours.)

The same language, with the substitution of the phrase "suit *in rem*" for the phrase "libel *in rem*" is used in Senate Bill S. 3076, introduced September 25, 1919, as a substitute for Senate Bill S. 2253. Senate Bill S. 3076

was enacted by the Senate in this form, and sent to the House. The House substituted an entirely new draft, known as "The Attorney General's Substitute," which was agreed to by the Senate and became, in substance, the Act of March 9, 1920. The phrase "and the vessel or cargo could be arrested or attached at the time of the commencement of suit" does not appear in the Act as passed. This phrase was in the original drafts of the Bill and in S. 3076 as first passed by the Senate. Its elimination indicates that the requirement that the vessel could be "arrested or attached" was in excess of the requirement that "a suit *in rem* could be maintained." As finally passed, therefore, the Act merely requires the libellant to show that his cause of action or substantive right is one such as District Courts "ordinarily have cognizance" of "in their admiralty and maritime jurisdictions."

It is well to note as to the intent or purpose of Congress that in the Public Vessel Act (46 U. S. C. A., par. 781, *et seq.*), enacted five years after the Suits in Admiralty Act (46 U. S. C. A., par. 741, *et seq.*), Congress expressly provided that if the libellants

> "did not reside or did not have an office for the transaction of business in the United States, and such vessel or cargo be outside of the territorial waters of the United States,"

then suits could be brought in any District Court of the United States (46 U. S. C. A., par. 782).

In the case at bar, the Circuit Court discriminated as between a private shipowner and the Government, in favor of the Government on the basis of an alleged technical defect in the form of the petitioners' libel. As pointed out by Judge Frank, in his dissenting opinion, the majority opinion unduly concerned itself on this aspect of the case with the form of the pleading. No objection was ever

made to the form of the libel by the respondent. The reason for it may have been that in another case between the same parties, wherein the same form of libel was used, the Court ruled on motion made by the respondent affecting said libel, the same was sufficient in form for an action *in rem* as well as for an action *in personam.*

Schnell v. United States, 69 Fed. Supp. 877, 878.

By its ruling the Circuit Court of Appeals overlooked the admonition of this Court in

Krauss Bros. Co. v. Dimon Steamship Corp., 290 U. S. 117, 124,

where the Court said:

> "Admiralty is not concerned with the form of the action, but with its substance."

The ruling of the Circuit Court is also in direct contradiction to the Congressional admonition that

> "The suit may proceed in accordance with the principles of libels *in rem* wherever it shall appear that had the vessel or cargo been privately owned or possessed, a libel *in rem* might have been maintained" (U. S. C. A., Title 46, Section 743).

It being the plain purpose of Congress by the Suits in Admiralty Act to provide a convenient forum and unequivocal consent for shippers to sue the Government, it is the duty of the Court to further this purpose within the limits of reasonable interpretation of legislative expression.

This Court adopted the rule contended for in

Nahmeh v. United States, 267 U. S. 122, 125-126.

See also:

Canadian Aviator, Lmtd., v. United States, 324 U. S. 215, 225-228.
Hust v. Moore-McCormick Lines, 328 U. S. 707.
McInnes v. United States, 152 Fed. (2nd) 387.
Benedict on Admiralty, 6th E., Vol. 1, p. 453.

Such interpretation of the Act is in accordance with the Congressional intent and is justified when its obvious purpose will otherwise be defeated.

Cabell v. Markham, 148 Fed. (2nd) 737, 739.
Markham v. Cabell, 326 U. S. 404.
Central Hanover Bank & Trust Co. v. Commissioner of Internal Revenue, 159 Fed. (2nd) 167-169.

The Supreme Court has recognized the right of a court in interpreting a statute, even though it be unambiguous in its terms, to construe any section thereof so as not to deflect the true purpose of the enactment as a whole.

Glickstein v. United States, 222 U. S. 139.

It will serve no useful purpose to discuss the question as to the extent *Blamberg Bros. v. United States,* 260 U. S. 452, on which the Court below relied, has been modified by subsequent decisions.

See:

McGhee v. United States, 62 Fed. Supp. 224, reversed on other grounds in 154 Fed. (2nd) 101.

It is undisputed that the steamer was within the jurisdiction of the Eastern District of New York during the pendency of the action, which fact was absent in the *Blamberg* case.

The interpretation of the statute contended for by the petitioners was adopted by the Circuit Court of Appeals for the Second Circuit in the case of

Carroll v. United States, 133 Fed. (2nd) 690,

although the complaint was dismissed against the United States because the suit was brought in the wrong district.

It has been followed in

Grant v. United States War Shipping Administration, 65 Fed. Supp. 507 (D. C. E. D. Penn.).

II.

The United States is liable *in personam* on the bills of lading issued by Compania Sud-Americana De Vapores for the Master.

The result of the decision of the Circuit Court of Appeals as to liability of the Government *in personam* is to perpetuate the error of the House of Lords in the case of

Baumwoll v. Furness, 62 L. J. G. B. 201 (1893).

The above decision cannot be justified in logic or by convenience of maritime commerce and cannot be supported by prior decisions of the English Law Courts nor by the decisions of our own Courts, as we hereafter point out.

This Court in the case of

Schooner Freeman v. Buckingham, 59 U. S. 182 (1855),

said at page 189:

> "We are of opinion that, under our admiralty law, contracts of affreightment, entered into with the master, in good faith, and within the scope of his apparent authority as master, bind the vessel to the merchandise for the performance of such contracts, wholly irrespective of the ownership of the vessel, and whether the master be the agent of the general or the special owner."

The above case was then disposed of on the theory of wilful fraud. The Court said at page 191: "The signature on the bill of lading was obtained by the fraud of the special owner."

When the owner of a ship entrusts an independent organization or its master with the entire control and use of the ship and gives them or him exclusive possession, it is reasonable to assume that the owner contemplates that the master will use the ship as an instrument of carriage and that by reason of his possession of the ship, he holds out to the world that he is authorized to enter into contracts of affreightment made in the course of the usual and lawful employment of the vessel. The owner will be presumed to know that the vessel will be used to carry cargoes belonging to third persons and that bills of lading will be issued and signed for such cargoes by the master representing the ship and the owners thereof. That is the immemorial way of shipping goods by water.

The master of a ship holds a peculiar and unique position.

As *Mechem* well said in his work on *Agency* (2nd Ed.), Section 76:

> "Certain officers of ships, as the master and the ship's husband, present well recognized forms of agency, but the consideration of their rights, authority and duties belongs rather to a treatise upon shipping or maritime law than to one upon the subject of agency generally."

There is nothing anomalous in a rule which imposes upon A, who has contracted with B, a duty to C and D and others, where he is put on knowledge or should know that the subject matter of the contract will be used or could be used so as to induce C and D and others to act thereon.

This argument applies with greater force to a ship which is personal property,

Krauss Bros. Co. v. Dimon S. S. Corp., 290 U. S. 117, 121,

which has no situs, traveling routes the world over, thereby making it impractical, and, in many instances, impossible for a shipper to do more than rely upon the apparent authority of the master.

This thought is implicit in judicial opinions dealing with this question.

As Chief Justice Taney said in

Naylor v. Baltzell, 17 Fed. Cases 10061.

at page 1257:

> "Undoubtedly, the master had a right to make this contract, under the circumstances in which he was placed, and the owners were bound by it; but this right is derived from the maritime code, which is founded in the general usages and convenience of trade, and which has been adopted, to a certain extent, by all commercial nations. The bill of lading (the contract on which this suit is brought) is an instrument founded on the usages of trade, and not connected with any of the peculiar doctrines of the common law."

This Court said in *The China*, 74 U. S. 53, 68:

> "The maritime law as to the position and power of the master, and the responsibility of the vessel, is not derived from the civil law of master and servant, nor from the common law. It had its source in the commercial usages and jurisprudence of the Middle Ages."

The rule of law contended for by the petitioners has been considered by English Courts of Admiralty and by our own District Courts on more than one occasion.

In *The St. Cloud* (Brown & L. [1863] p. 4), the Court said at page 15:

> "It is contended, however, that the contract contained in the bill of lading was made by the master as agent for the charterer, and not as agent for the owner; and in support of this position, is cited the case of *Schuster v. McKellar* (7 Ell & B 704). But there is an important distinction in this case. The shipper is not proved to have had notice of the charter-party. Until he had such notice, he would be justified in supposing that in dealing with the master for the carriage of his goods, he was dealing with the owner's agent. For *prima facie*, the master is the agent of the owner of the ship. I cannot think that it is consistent with justice, or according to ordinary mercantile practice, that a shipper of goods on board a ship put up in the usual way should lose his right to sue the owner for damage, on account of a charter of this description, of which he has no notice. I think the burden of proof must fall upon the ship owner claiming exemption from liability; he must show that the shipper had notice of the charter, and was aware that in making the contract, the master was agent for the charterer."

The above language was cited with approval in *Sandeman v. Scurr* (1866 Law Rep. 2 Queens Bench 97) by Cockburn, *C. J.*

And again in

> *Hayn v. Gulliford* (1878 L. R. 3 Comm. Pleas Div. 410),

where Judge Denman said at page 415:

> "The plaintiff in the present case had no notice whatever of any charter party until after the damage. The bill of lading, though not signed by the master, was signed by persons purporting to act for the defendants: there was nothing calling the attention of the plaintiffs to look to anyone save the master or ship-owners to perform that which

> is the *prima facie* duty of the master and ship-owner, viz. to stow the goods safely. Under the circumstances I think that, the duty having been negligently discharged, especially where it was discharged in so palpably negligent a manner, as that described in the defendants' letter of the 4th of December, it is clear that an action would lie against the ship-owners, and the ship-owners would be estopped from relying upon a charter party of which the plaintiffs had no notice, for any purpose."

The above judgment was affirmed in the Court of Appeals (Bramwell, Brett and Cotton, L. J. J.).

(1879 L. R. 4 Comm. Pleas Div. 182.)

In

> *Peek v. Larsen* (1871 Law Reports Equity Cases, Vol. 12, p. 378),

Lord Romilly, M. R., said at page 383:

> "I fully admit that every person is bound by the contents of a charter-party of which he has notice. If he does not choose to inquire what the contents of the charter-party are, that is his own fault, and he must take the consequences of it. But I am of opinion, that until he is either set upon inquiry or has notice of a charter-party, he is not bound to assume that there is a charter-party."

Our own courts considered the same question in the case of *Venezuelan Meat Export Co. v. United States*, 12 Fed. Supp. 379, where William C. Coleman, D. J., said at page 386:

> "Secondly, with respect to the contention that the United States Government cannot be liable because not a party to the bills of lading, we find no merit in this contention * * *. The bills of lading, signed by the master and containing no reference to the charter-party, nor to the owner, nevertheless bind the government, as owner, because, as

> between the shipper and the owner, the master was acting for the owner. *The Themis* (C. C. A.), 275 F. 254, certiorari denied, *Barber & Co. v. Wilhelmsen*, 257 U. S. 655, 42 S. Ct. 97, 66 L. Ed. 419."

The Circuit Court of Appeals in the case at bar held contrary to these cases on the authority of

> *Baumwoll v. Furness*, 62 L. J. G. B. 201 (1893),

and

> *The Captain Faure*, 10 Fed. (2) 950, 962 (C. C. A. 2) (Cert. denied 271 U. S. 684),

which cited the *Baumwoll* case and *Scrutton* on Charter Parties and Bills of Lading for its authority.

The learned Court overlooked the admonition of the author at page 5:

> NOTE: "The modern tendency is against the construction of a charter as a demise or lease. Nearly all the cases of demise are old cases, and their authority has been somewhat shaken by modern decisions."

The *Captain Faure* case cites with approval the language of this Court in the case of

> *Schooner Freeman v. Buckingham*, 59 U. S. 182, 189,

quoted in this brief on page 14, and the Circuit Court concludes that quotation with this language:

> "And we are not aware that the Supreme Court in any subsequent case has ever expressed a contrary opinion."

Baumwoll v. Furness, which is the basis of all the expressions of the rule to the effect that under certain circumstances the captain is the servant of the charterer and not of the owner and a bill of lading signed by the captain binds the charterer but not the shipowner, is wrong in principle, so far as it affects the rights of third parties.

The Lord Chancellor (Lord Herschell), who wrote the opinion in *Baumwoll v. Furness,* argued on the theory that a ship was like a piece of real property and compared a charter-party to the leasing of a house. It is his failure to distinguish between the law of real property and agency and the law merchant which, historically always controlled the relation of shipper and shipowner in the carriage by sea, that makes the decision untenable. It overlooks the fact that the shipowner puts it in the power of the charterer or his captain to issue bills of lading for goods carried on the ship.

The reason for the error was well explained by Justice Holmes in his book, "The Common Law," where he discusses the attributes of English Courts as to admiralty law:

> "But there the court of appeal, the Privy Council, has been largely composed of common-law lawyers, and it has shown a marked tendency to assimilate common-law doctrine. At common law one who could not impose a personal liability on the owner could not bind a particular chattel to answer for a wrong of which it had been the instrument" (pp. 27-28).

There is every reason found in the law of equitable estoppel and in sound public policy for holding the owner of the ship responsible for the master's bills of lading. No injustice is involved in such rule, for the shipowner can relieve himself of any liability by making the charter party part of the bill of lading.

As Judge Woolsey said in

The Carso, 43 Fed. (2nd) 736 (D. C. S. D. N. Y.),

at page 744:

> "A bill of lading is a document of dignity, and courts should do everything in their power to preserve its integrity in international trade for there, especially, confidence is of the essence."

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JOSEPH JOFFE,
Counsel.

New York, April, 1948.

ADDITION.

Title 46, U. S. C. A.

Par. 742, *Libel in personam:*

"In cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel *in personam* may be brought against the United States or against any corporation mentioned in section 741 of this title, as the case may be, provided that such vessel is employed as a merchant vessel or is a tugboat operated by such corporation. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. The libelant shall forthwith serve a copy of his libel on the United States attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service on the United States and such corporation. In case the United States or such corporation shall file a libel *in rem* or *in personam* in any district, a cross libel *in personam* may be filed or a set-off claimed against the United States or such corporation with the same force and effect as if the libel had been filed by a private party. Upon application of either party the cause may, in the discretion of the court, be transferred to any other district court of the United States." March 9, 1920, c. 95, section 2, 41 Stat. 525.

Par. 743, *Procedure in cases of libel in personam:*

"Such suits shall proceed and shall be heard and determined according to the principles of law and to the rules or practice obtaining in like cases between private parties. A decree against the United States or a corporation mentioned in section 741 of this title may include costs of suit, and when the decree is for a money judgment, interest at the rate of 4 per centum per annum until satisfied, or at any higher rate which shall be stipulated in any contract upon which such decree shall be based. Interest shall run as ordered by the court. Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. If the libelant so elects in his libel, the suit may proceed in accordance with the principals of libels *in rem* wherever it shall appear that had the vessel or cargo been privately owned and possessed a libel *in rem* might have been maintained. Election so to proceed shall not preclude the libelant in any proper case from seeking relief *in personam* in the same suit. Neither the United States nor such corporation shall be required to give any bond or admiralty stipulation on any proceeding brought hereunder. Any such bond or stipulation given prior to March 9, 1920, in admiralty causes by the United States or the United States Maritime Commission, shall become void and be surrendered and cancelled upon the filing of a suggestion by the Attorney General or other duly authorized law officer that the United States is interested in such cause, and assumes liability to satisfy any decree included within said bond or stipulation, and thereafter any such decree shall be paid as provided in section 748 of this title." March 9, 1920, c. 95, section 3, 41 Stat. 526; Ex. Ord. No. 6166, section 12, June 10, 1933; June 29, 1936, c. 858, sections 203, 204, 904, 49 Stat. 1987, 2016.

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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 768

HARRY SCHNELL, SAMUEL SCHNELL, LOUIS SCHNELL and SAUL SCHNELL, Co-partners doing business under the firm name and style of H. Schnell & Co., PETITIONERS

v.

THE UNITED STATES OF AMERICA, as owner of the Steamship "TUBUL"

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 102-112) is reported at 166 F. 2d 479. The findings of fact and conclusions of law of the District Court for the Eastern District of New York (R. 94-96) have not

been officially reported. The opinion of that court (R. 91-93) is reported at 73 F. Supp. 757.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 1, 1948 (R. 113). The petition for a writ of certiorari was filed on April 27, 1948. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the reversionary owner of a vessel may be held liable on *in personam* principles for damage caused by acts or omissions of the agents of the bareboat charterer of the vessel to cargo carried under bills of lading issued by the agents of the bareboat charterer.

2. Whether a libel under the Suits in Admiralty Act filed against the United States on *in personam* principles may be amended in the course of the trial after the statute of limitations has run so as to add for the first time an election to proceed on *in rem* principles as well.

STATUTES INVOLVED

The pertinent provisions of the Suits in Admiralty Act (Act of March 9, 1920, 41 Stat. 525, 46 U. S. C. 741 *et seq.*) are set forth in the Appendix, *infra*, pp. 11-14.

STATEMENT

On September 15, 1943, the United States chartered the SS TUBUL (formerly known as SS PATRICIA SKAKEL) to the Republic of Chile under a "Demise Charter Party for Vessels Bareboat" (R. 70). Article 13 of the charter prescribed that the "Charterer shall, at its own expense or by its own procurement, man, victual, navigate, operate, supply, fuel and repair the Vessel and pay all charges and expenses of every kind and nature whatsoever incident thereto" (R. 75). As authorized in the charter, the Republic of Chile subsequently subchartered the vessel to the Chilean Line (Compania Sud Americana de Vapores) (R. 76, 94). The master and crew of the SS TUBUL were hired and paid by the Line (R. 37). The Line also paid for fuel for and repairs to the vessel (R. 38); made the contracts with the shippers (R. 38); arranged for sailing schedules of the vessel (R. 39); collected and retained the freights (R. 38); issued bills of lading in its own name (R. 38), and conducted all of the other operations connected with the movement of cargo by the SS TUBUL (R. 37-39).

While the charter was in effect and during the course of its operation of the vessel under the subcharter, the Chilean Line transported for petitioners certain garlic from Valparaiso, Chile to New York City (R. 2-4). Shortly after arrival of this shipment in New York on March 22, 1945 (R. 20), the petitioners notified the Chilean Line that the goods were

"discharged in badly broken condition due to careless handling" and that they intended to hold the Line responsible for those damages (R. 68). On August 13, 1945, petitioners filed in the District Court for the Eastern District of New York a libel *in personam* against the United States, as owner of the vessel, claiming that as a result of the "negligence of the Steamship "TUBUL" in respect to the loading, stowing, custody, care and proper delivery," the contract of carriage had been breached, with resulting damages to the merchandise in the amount of $4,361.65 (R. 4-5). At the time the libel was filed, the vessel was moored to a pier at Valparaiso (R. 33, 69). The libel gave no indication of any intention to proceed *in rem* (R. 2-5).

The United States, in its answer to the libel, denied liability, but not the court's jurisdiction, and prayed for dismissal of the libel (R. 7-11). After the libel was filed, the vessel was within the Port of New York on several occasions, for varying periods of time up to and including April 23, 1947, the date on which the trial actually commenced.[1] On that date, the United States amended its answer to deny the jurisdiction of the court on the grounds (1) that the vessel was not in the waters of the United States nor in the waters of any of its terri-

[1] The SS TUBUL was, during the first year after the delivery of the goods, within the Port of New York for approximately 80 days on four separate occasions. During the second year following the accrual of the cause of action, the vessel was in the Port of New York on 5 more trips involving an aggregate of an additional 73 days (R. 69, 95).

tories or possessions on the date of filing of the libel, and (2) that during the voyage here involved, the vessel had been possessed, operated and controlled by the Chilean government and its agents under demise charter and hence had not been possessed, operated, controlled or navigated by the United States (R. 17-18). On the same date the court authorized petitioners to amend their libel in effect to add an allegation of an election to proceed *in rem* as well as *in personam* (R. 34, 106, 109).

At the conclusion of the trial the district court dismissed the libel. It held that the United States was not liable *in personam* because under the demise charter the Chilean Line manned and operated the vessel and because the suit was based on the alleged breach of contracts of carriage issued not by the United States but by the Chilean Line (R. 93). It also held that the libel could not be prosecuted as an *in rem* proceeding because the vessel was not within the United States but in Valparaiso when the libel was filed (R. 92).

On appeal, the court below affirmed the district court on the grounds relied on by that court (R. 102-108). In addition, the court below held that petitioners' attempted addition to their existing cause of action of an election to proceed on *in rem* principle was ineffective inasmuch as petitioners had failed, as required by Section 2 of the Suits in Admiralty Act, Appendix, *infra*, pp. 11-12, to serve the Attorney General (R. 105). Judge Frank dis-

sented from the affirmance of the dismissal of the action *in rem* (R. 108-112).

ARGUMENT

1. Petitioners' contention (Pet. 14 ff.) that the United States is liable on *in personam* principles for cargo damage allegedly caused by the vessel's subcharterer, the Chilean Line, is clearly unsound. Both the district court and the court below, without dissent, found that the SS TUBUL, during the voyage here involved and while the demise charter was in effect, was under the exclusive command, possession and control of the Chilean Line, the subcharterer.[2] Accordingly, both courts below properly held that in the absence of possession and control on the part of the United States, it was completely immune from any *in personam* liability to third parties who may have suffered damage by acts or omissions of the charterer or subcharterer. These holdings are in accord with the long-settled law that a demise charterer, who assumes complete possession, operation and control of the ship, becomes owner *pro hac vice* of the vessel and thereby undertakes the obligations and responsibilities of the reversionary owner. *Reed* v. *United States,* 11 Wall. 591, 601; *Leary* v. *United States,* 14 Wall. 607, 611; *United States* v. *Shea,* 152 U. S. 178, 186; *Vitozi* v. *Balboa Shipping Co.,* 163 F. 2d 286

[2] Under the well-established rule, these concurrent findings will not be reviewed by this Court. *Just* v. *Chambers,* 312 U. S. 383, 385; *Piedmont Coal Co.* v. *Seaboard Fisheries Co.,* 254 U. S. 1,13; *Luckenbach* v. *McCahan Sugar Co.,* 248 U. S. 139, 145.

(C. C. A. 1); *Pan American Airways, Inc.* v. *Quilez et al.*, 154 F. 2d 496 (C. C. A. 5); *Schnell* v. *United States*, 69 F. Supp. 877 (E. D. N. Y.).[3]

2. Petitioners' contention that the United States can be held liable on *in rem* principles is equally untenable. The grounds for the concurrent decisions of both courts below on the *in rem* aspect of the case are set forth in the statement, *supra*, p. 5.[4] In addition to those grounds, we believe it clear that petitioners' attempted election to proceed on *in rem* principles was barred by the expiration of the two-year jurisdictional period, prescribed by Section 5 of the Suits in Admiralty Act,

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[3] Nor can the basis for such an *in personam* liability be spelled out merely because the bill of lading made no reference to the charter party or because the shipper claimed no notice of its existence. *Baumwill Manufactur von Carl Scheiber* v. *Furness*, Law Reports (Appeal Cases) 1893, p. 8; *The Capitaine Faure*, 10 F. 2d 950, 962 (C.C.A. 2), certiorari denied, *sub nomine Societe de Navigation a Vepeur France Indo-Chine* v. *Cooper & Cooper, Inc.*, 271 U. S. 684.

[4] This Court has already considered and declined to accept the principal argument here made by petitioners (Pet. 10-11), that the legislative history of the Suits in Admiralty Act shows a Congressional intention to divorce *in rem* jurisdiction from its traditional foundation, i. e., availability of the vessel for arrest. *Blamberg Bros.* v. *United States*, 260 U. S. 452, 459. See also *Nahmeh* v. *United States*, 267 U. S. 122; *Carroll* v. *United States*, 133 F. 2d 690 (C.C.A. 2).

It should also be noted that, despite petitioners' contention (Pet. 6), there is no conflict of decisions in the lower courts with respect to the well-settled law governing the issues involved in the instant case. The only existing conflict, in the cases cited by petitioners, is concerned with whether the provisions in the Suits in Admiralty Act, which indicate the districts in which suits under that Act shall be brought, are jurisdictional or merely venue requirements. That issue, not present in this case, is before this Court in *Hoiness* v. *United States*, No. 604, this Term, certiorari granted, March 29, 1948.

as well as of the one-year limitation period of Section 3 of the Carriage of Goods by Sea Act.

The damaged cargo upon which the petitioners based their libel was delivered to petitioner in March 1945 (R. 20). The original libel, filed August 13, 1945, proceeded solely on *in personam* principles and gave no indication whatsoever that the libellants intended to proceed *in rem* (R. 2-5). It was only on April 23, 1947, in the course of the trial, that the petitioners for the first time indicated they wished to proceed *in rem* and moved to amend the libel for that purpose (R. 34). This motion was allowed and assumed by the court to be equivalent to an amendment electing to proceed *in rem* (R. 106). Since the *in rem* election was therefore first made after the expiration of the two-year jurisdictional period prescribed by Section 5 of the Suits in Admiralty Act, and after the one-year limitation period prescribed by Section 3 of the Carriage of Goods by Sea Act,[5] it is clear that petitioners' attempt to proceed on *in rem* principles was time-barred.

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[5] Act of April 16, 1936, 49 Stat. 1207, 46 U.S.C. 1303(6). Section 3 of that Act indicates that "the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods • • •." That the United States may, in an *in rem* proceeding against it under the Suits in Admiralty Act, avail itself of the defense of this one year statute of limitations is clear from Section 6 of the Suits in Admiralty Act (Appendix, *infra*, p. 14), which provides that the United States "shall be entitled to the benefits of all exemptions and of all limitations of liability accorded by law to the owners, charterers, operators, or agents of vessels."

The fact that a libel alleging liability arising out of the same factual situation, had been commenced along purely *in personam* lines on August 13, 1945, before the end of either limitation period, does not in any way affect this conclusion. Inasmuch as an *in rem* proceeding is directed against the *res* rather than the personal liability of the vessel owner, it presents a wholly different basis for recovery (*Carroll* v. *United States,* 133 F. 2d 690 (C. C. A. 2)) and is subject to defenses substantially different from those available to a respondent in an *in personam* case (*Eastern Transportation Co.* v. *United States,* 272 U. S. 675, 690). Consequently, an *in rem* action presents a new and totally different proceeding from a libel based exclusively on an alleged *in personam* liability. *Turner* v. *United States,* 27 F. 2d 134 (C. C. A. 2).[6] And when a new and different cause of action is sought to be set up by an amendment filed after an applicable statute of limitations has run, even though it be based on the same factual situation, the statute applies in the same manner as if no prior original petition had ever been filed. *L. E. Whithan Construction Co.* v. *Remer,* 105 F. 2d 371 (C. C. A. 10); *Dawnic Steamship Corp.* v. *United States,* 90 C. Cls. 537; *Hammond-Knowlton* v. *United States,* 121 F. 2d 192 (C. C. A. 2); certiorari denied, 314 U. S. 694. And where, as

[6] The difference between the two actions, noted in the cases cited as well as in the opinion of the court below, is also recognized by Federal Admiralty Rules, 2, 4, 10, 14 and 34.

here, the statute of limitations is contained in a statute which confers the right to sue the United States, it is well-settled that such time-bar is jurisdictional in nature and may not be waived or be deemed to have been waived by attorneys for the Government. *Munro* v. *United States,* 303 U. S. 36; *Finn* v. *United States,* 123 U. S. 227; *Gans SS Line* v. *United States,* 105 F. 2d 955 (C. C. A. 2), certiorari denied, 308 U. S. 613, rehearing denied, 310 U. S. 658.

CONCLUSION

The decision of the court below is correct, and, in addition, with respect to the *in rem* action, is sustained by the bar of the statutes of limitations. There is no conflict of decisions. The petition for the writ of certiorari should therefore be denied.

Respectfully submitted.

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MAY, 1948.

APPENDIX

Sections 1, 2, 3, 5 and 6 of the Suits in Admiralty Act (Act of March 9, 1920, as amended, 41 Stat. 525, 47 Stat. 420, 46 U. S. C. 741, *et seq.*) provide as follows:

SEC. 1. That no vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and no cargo owned or possessed by the United States or by such corporation, shall hereafter, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions: *Provided,* That this Act shall not apply to the Panama Railroad Company.

SEC. 2. That in cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against such corporation, as the case may be, provided that such vessel is employed as a merchant vessel or is a tug boat operated by such corporation. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or

cargo charged with liability is found. The libelant shall forthwith serve a copy of his libel on the United States attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service on the United States and such corporation. In case the United States or such corporation shall file a libel in rem or in personam in any district, a cross-libel in personam may be filed or a set-off claimed against the United States or such corporation with the same force and effect as if the libel had been filed by a private party. Upon application of either party the cause may, in the discretion of the court, be transferred to any other district court of the United States.

SEC. 3. That such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties. A decree against the United States or such corporation may include costs of suit, and when the decree is for a money judgment, interest at the rate of 4 per centum per annum until satisfied, or at any higher rate which shall be stipulated in any contract upon which such decree shall be based. Interest shall run as ordered by the court. Decrees shall be subject to appeal and revision as now provided in other cases of admiralty and maritime jurisdiction. If the libelant so elects in his libel the suit may

proceed in accordance with the principles of libels in rem wherever it shall appear that had the vessel or cargo been privately owned and possessed a libel in rem might have been maintained. Election so to proceed shall not preclude the libelant in any proper case from seeking relief in personam in the same suit. Neither the United States nor such corporation shall be required to give any bond or admiralty stipulation on any proceeding brought hereunder. Any such bond or stipulation heretofore given in admiralty causes by the United States, the United States Shipping Board, or the United States Shipping Board Emergency Fleet Corporation, shall become void and be surrendered and canceled upon the filing of a suggestion by the Attorney General or other duly authorized law officer that the United States is interested in such cause, and assumes liability to satisfy any decree included within said bond or stipulation, and thereafter any such decree shall be paid as provided in section 8 of this Act.

* * * * * *

SEC. 5. That suits as herein authorized may be brought only on causes of action arising since April 6, 1917: *Provided,* That suits based on causes of action arising prior to the taking effect of this Act shall be brought within one year after this Act goes into effect; and all other suits hereunder shall be brought within two years after the cause of action arises. * * *

SEC. 6. That the United States or such corporation shall be entitled to the benefits of all exemptions and of all limitations of liability accorded by law to the owners, charterers, operators, or agents of vessels.

U. S. GOVERNMENT PRINTING OFFICE, 1943